By the law applicable to the case, the Circuit Court should not have admitted oral testimony to prove the contract declared upon, but under the circumstances, it should have required the production of a writing, made in conformity with the provisions of the statute of New Jersey to prevent frauds and perjuries. Upon this point, then, the Court should be advised that the verdict must be set aside, and the plaintiffs non-suited.

In the Supreme Court of Pennsylvania.

MILLER *vs.* GILLELAND.

1. Where the holder of a bond or note makes an alteration in its date, he avoids the instrument, even though the alteration was in truth the correction of a mistake, and was so intended.—LOWRIE and WOODWARD, J. J. *dissenting.*
2. The original action here was upon a note under seal. The plaintiff alleged that the note was dated as of a wrong year, and altered it for the purpose of making it conform to the truth. On the trial it was objected, that the note was avoided by the alteration, and thereupon the plaintiff proved that the alteration was honestly made in mere correction of a mistake, and under the instruction of the Court, (WATTS, P. J.) that this was a sufficient answer to the objection, the plaintiff had a verdict, and judgment was entered thereon. To this instruction the error is assigned.

The opinion of the Court was delivered by

GIBSON, J.—The conveyance of an estate which lies in livery and not in grant, is not avoided by an alteration even in a material part of it: for the title, being vested by a deed having by statute the force of livery of seisin, can be revested only by a reconveyance. (*Bull, N. P.* 217.) But an alteration of a bond, bill or note, stands on a different principle. Where it is made by the voluntary act of the creditor and increases or injuriously affects the responsibility of the debtor, what ever the motive for it, the security is gone. The rule is founded in policy to protect the debtor from acts prejudicial to him, hard to be guarded against, and done in his absence, and without his agency or consent; but it is unapplicable to an alteration which leaves the legal effect of the instrument as it was before, as was held in *Zouche*

vs. *Clay*, 1 Vent. 185; *Hunt* vs. *Adams*, 6 Mass. 519, *Nevins* vs. *De Grand*, 15 Mass. 436, and some other cases. Where there can be no wrong, the policy of protection has no place. But in no other case can the bona fides of an unauthorized alteration of a security in *the hands of the holder*, purge it of its ostensible impurity.

There is a class of cases apparently inconsistent with the rule just indicated, but not actually so. In those an interlineation or an erasure has been explained by showing it to have been made *before* the bill had been accepted or the note negotiated; or that it had received the assent of the parties interested; but in this respect it has received no more indulgence than an erasure or alteration of a deed before delivery. Of this class are *Henman* vs. *Dickenson*, 5 *Bingh*, 183, *Knight* vs. *Clements*, 8 Adolph and El. 221, *Bishop* vs. *Chambre*, 3 C. and P. 53. *Clifford* vs. *Parker*, 2 Mann and Grang, 910, and *Cariss* vs. *Tattersall*, id. 890. In England there is still another class decided on the stamp acts, which furnishes no rule for the protection of the debtor. The question had regard to the protection of the revenue; and parol evidence was received to show that an alteration of a date was not made to save the expense of a new stamp. Of this class is *Kershaw* vs. *Cox*, 3 Esp. N. P. C. 246, and others which might be quoted.

On the subject of alteration in the body of a note, the cases are harmonious, but on the subject of adding to the evidence of attestation they are not entirely so. In *Adams* vs. *Frye*, 3 Met. 103, it was said that if an obligee fraudulently procure a person who was not present at the execution to subscribe as a witness, he destroys his security; but it was further said that this consequence may be avoided by proving the act to have been done honestly. And this for two reasons, that as the bond is complete without a subscribing witness, the obligee cannot be harmed by putting a name to it which is merely surplusage, but that if the name be put to it with a foul design, the obligee should be punished for his turpitude. The first of these is evidently fallacious, for proof of the hand writing of the supposititious witness, would in the event of his death or absence be prima facie evidence of execution; and in that aspect, the obligee might be as much injured by an alteration in the clause of attesta-

tion as by an alteration in the body of the bond; and the second is equally so; for if loss of the security be a penalty for an abortive attempt at fraud, it ought to be inflicted for a bungling attempt to alter the effect of the instrument which failed only for want of capacity to accomplish it. But whatever be the decision in Adams *vs.* Frye, it is enough for the occasion that the point was ruled differently in *Marshall* vs. *Goughler*, 10 S. and R. 164, which furnishes a precedent that we are bound to follow.

On the abstract principle all our own decisions are to the same effect, and they stand as clear on principle as they do on precedent. The law no more abhors parol evidence to explain the words of a written contract than it abhors it to show what were the words themselves when the contract was executed. The danger from it in either way is the same. A chancellor, in the exercise of his extraordinary discretion doubtless receives it to reform an instrument, but cautiously, and only in clear cases of accident, omission or mistake, and where the conduct of the party seeking relief is above suspicion. But to tolerate an attempt to reform a security by the rash, and it may be a secret act of the creditor, would change the position of the debtor, and subject him to risk and trouble which ought not to be imposed on him.

It would compel him to encounter the perils of parol proof, not only to establish the fact of alteration, but to show what the instrument originally was; and that done, to meet the creditor's proof of bona fides. Ought a faultless party to be involved in such a contest out of tenderness to an ignorant and presumptuous creditor; or be exposed to the untruthfulness of witnesses, or the misconceptions of jurors? It is a familiar principle that a particular hardship shall be borne by him whose act was the cause of it.

The alteration of the date in this instance did not retard the day of payment, and consequently did not discharge the defendant as a surety by giving time to the principal; but it is not easy to imagine how an alteration of the date of a security for money may not be detrimental to the debtor. If the day of payment be accelerated by it the debtor loses a part of the time for which he stipulated, and the computation of interest is affected by it. If it be retarded,

the starting of the statute of limitations, on the presumption of payment from lapse of time, is also retarded by it; and such alterations have been made to evade the one or the other. As the plaintiff in this case brought suit within six years of the true date, the defendant could not be prejudiced in that respect further than the risk and expense incurred in showing the truth—which is clearly a substantive injury to him—but the injury has regard to the possible effect of the alteration when it was made, and not to its present effect as things have turned up. If the note was avoided by it, and no one can doubt it, it is still void; and so the jury ought to have been directed.

Judgment reversed.

Justice LOWRIE dissented and delivered the following opinion, Justice WOODWARD concurring therein.

Fleming Gilleland held the joint and several note of Witherow and Miller *under seal*, on which Miller was in fact surety, for the sum of $322,56, and dated September 24th, 1836. In 1839 or 1840, and after the note had become due, Gilleland, in the presence of Miller, spoke about there being an error in the date of the note, and there was some conversation between the witness, Gilleland, and Miller about it. Miller said he knew nothing about it and could say nothing. Yet Gilleland then and there got the witness to make the alteration of the date from 1836 to 1838. Under the instructions of the Court the jury have found that the true date of the transaction was 1838 and that the alteration was the correction of a mistake. Does this fact justify the alteration? Does the alteration of an instrument by the holder of it, honestly made for the mere purpose of correcting a mistake, vitiate it? This is the question of the cause.

In considering this question we set aside the relation of Miller as surety; because he was not affected by the alteration of the date to what in truth it should have been: for the truth wrongs no man. We set aside also the old rule that every material alteration avoided the instrument, because it could no longer be alleged or proved as the very agreement of the parties—a rule that applied to accidental and honest, as well as to fraudulent alterations, but which has long since ceased with the reason of it.

Now it is said that every material alteration of a contract by one of the parties, makes it void in his hands, because it is against public policy to allow any tampering with written instruments.

And why must the alteration be a material one? Under the old rule, immaterial alterations were disregarded, because they occasioned no variance between the allegations and the proof; but this reasoning will not do under a rule to prevent tampering with written instruments.

It will not do to say that they do no wrong: for neither does an alteration that accords with the truth do wrong. It is not sufficient to answer that it improperly compels the other party to encounter the perils of parol proof as to a written contract: for even immaterial alterations do this, when there is an erasure or mutilation, which cannot be ascertained to be immaterial without resorting to parol proof as to the original state of the instrument. 10 Shepley, 329. But it is not the act of one party, the correction, that opens the door to parol evidence. That is already open in all cases where fraud or mistake is alleged. When the parties made this mutual mistake in the date, or alleged it, they had a right to parol proof to ascertain and correct it.

If by material alteration, one is meant which materially changes the true contract of the parties, then we escape these difficulties and we discover harmony in the principles usually announced on the subject. Then an immaterial alteration does not vitiate the instrument, because it does not change the true rights of the parties; it does no wrong to either. If it be a correction, it is doing what the law would do; and from all this no fraudulent intention can be inferred. But a material alteration is totally different, and it avoids the contract, because fraud is necessarily inferred. And then the rule applies that the law helps no man out of a position into which he has fraudulently placed himself.

Whence, then, comes the rule of policy that punishes a man so severely for an act that is true and honest though unwise? It is natural to look to the laws concerning forgery, their express purpose being in fact to prevent all tampering with written contracts. But we do not find it here: for their policy is to prevent "fraudu-

lent" alterations "to the prejudice of another man's rights." They punish for crimes, not indiscretions. But the policy of the rule now contended for does not thus discriminate. Its punishements are not at all proportioned to the offence; for it inflicts the same penalty where a dishonest intent does not, as where it does appear. Besides this, its mode of punishment is by taking the money of an honest man and giving it, not to the State whose policy has been violated, but to another man who has no merit, and who has not been wronged, and whose defence cannot be honest if the alteration be the correction of a mistake.

If this policy cannot be founded upon well established principles and justified by them, then it is arbitrary in its character and the Court has no right to declare it. It is not common law, for it shocks, instead of according with the common sense and general customs of the people. It is an attempt to found a practice, rather than to enfore a principle. It is not the duty nor the right of Courts to teach people what is duty by establishing new rules? but to ascertain and declare, and apply those already existing. They teach law in administering it, but administration only is their duty. If we declare that a fraudulent alteration vitiates, we logically apply the ordinary rule that fraud vitiates every contract that it taints.

And there is great merit in this rule, for common honesty suggests it, it requires no abitrary teaching, and no honest man can ever be entrapped by it. The law is and ought to be strict in dealing with fraud; but it cannot and ought not to be strict in dealing with acts that are merely unwise, or that display want of care or skill. Hence a very important branch of the law is designed to relieve people from mistakes, so far as this can be done without prejudice to others, and in *Jeremy's Eq. Jur.* 358, mistake is defined as the "result of ignorance of law or fact, which has misled a person to commit that which, if he had not been in error, he would not have done;" a definition that includes an act done as this was.

The law would be most grievously defective, if it visited the loss of rights upon acts or omissions in which there is no moral tupitude, unless in cases where there is very great risk in affording a remedy. Where it is clearly proved that a written contract has been mutila-

ted, altered or destroyed, or lost by accident or mistake, or by the act of a stranger, the Courts do not hesitate to admit parol evidence. 8 Watts, 448. Yet in almost all such cases, the necessity arises from the carelessness of the party offering the evidence. Let those who would refuse a remedy in the present case draw any clear and satisfactory distinction, in degree, between the fault of omission there and the fault of commission here.

Where, then, do we find the principles or analogies on which the alleged policy is founded? It is not in that rule that declares all contracts void, the subject matter of which is morally or legally wrong; for the principle there is totally different. It is not, except as a mere legal suspicion, in those cases where a man obtains a contract by taking an undue advantage of his own position or of the postion of the other party; for in these cases the party does not lose his rights, but the Courts relieve the injured, by doing justice to both.

We might expect to find the policy in the cases arising under the English Stamp Act, but we do not. Such is the exceeding proneness of men to defraud the government of its taxes that the Courts are compelled to be exceedingly suspicious of all altered instruments; and this expresses the policy and the reason of it. It relates to transactions in which the government on one side and the contracting parties on the other, are the parties. By an alteration, a new agreement may be made on a stamp already once used, and it might be policy to require the parties to get a new stamp rather than allow them to make an alteration, and to declare the agreement void for want of it. But such is not the case. Even the use of an improper stamp may be corrected by a new one, and if there is a mistake in the agreement, it may be corrected even after delivery, if the parties can prove that the alteration was the correction of an original mistake. Then the alteration is no injury to the government and the danger of frauds is not considered a sufficient reason for excluding the evidence. Here then is a policy of extreme suspicion, in order to protect the taxing power against the frauds of the tax payer. But it is a suspicion that charges fraud and allows its disproval; not one that condemns without a hearing. 10 East. 431. 12 id. 471. 15 id. 412. 14 Mees. & W. 873.

Thus far we have endeavored to show that there is no proper foundation for the rule of policy contended for; and now we shall show by direct evidence that it does not exist. Mr. Greenleaf in his Evidence, Sect. 564, considers the true rule to be that even material alterations do not vitiate, if they appear to have been made with an honest intention, and such is clearly announced as the law in *Granite Railway Co.* vs. *Bacon*, 15 Pick, 239. *Beaman* vs. *Russel*, 20 Verm. 205. *Bliss* vs. *McIntire*, 18 id. 466. *Montgomery R. R.* vs. *Hurst*, 9 Ala. R. 513.

And more directly to the purpose, it has often been said and decided that an alteration by one party, to make the instrument conform to the original intention of the parties, does not vitiate. *Hervey* vs. *Hervey*, 3 Shepl. 357. *People* vs. *Muzzy*, 1 Denio, 239. *Boyd* vs. *Brotherson*, 10 Wend. 93. *Hatch* vs. *Hatch*, 9 Mass. 307. *Hamelin* vs. *Bruck*, 9 Queen's B. R. 306. *Fubb* vs. *Madding*, Minor's Rep. 129.

In many other cases the instinct of common sense has led the courts to assume that a fraudulent intention is a necessary part of the act that vitiates, even when they have not had leisure to attempt a logical analysis, or definition of the rule. 1 Greenl. 73. 8 Cow. 75. 4 T. R. 329. 1 Shepl, 386. 15 East, 29. 11 Mees & W. 465. 2 Mason, 478. 2 Wash. 218. 2 N. Hamp. 543. 11 Conn. 531. 10 id. 197. 2 Barb. C. R. 12, 8 Ad. & El. 136.

In *Hale* vs. *Russ*, 1 Greenl. 334, the name of the obligee was changed, and in *Ogle* vs. *Graham*, 2 Penna. R. 132, the amount was reduced, without the consent of sureties; and it was held that, as there was no fraudulent intent, the consent of the sureties would be presumed. And so in other cases where another promisor is added. 6 Alab. 513. 8 Dana, 98. In *Bowers* vs. *Jewell*, 2 N. Hamp. 542, Mr. Justice Woodbury says, "the alteration must be done with an eye to gain an advantage, and that cannot be the case if the alteration makes the sum less, or gives a longer time for payment, and whether it is fraudulent or not should be submitted to the jury." In *Prevost* vs. *Gratz*, 6 Wheat. 502, an alteration by the holder is sustained on the ground that it must have been honestly done. And in *Whiting* vs. *Daniel*, 1 Hen. & M. 391, the fill-

ing up of a date without fraud was held not to vitiate. In *Nevens* vs. *De Grand*, 15 Mass. 436, a special endorsement was stricken out "with honest intentions," and was allowed to be restored. 10 Eng. C. L. R. 140. 2 id. 176. 3 T. R. 153 n.

Though the improper addition of a subscribing witness is material, yet it has often been held that, if it appear to have been done without any intention to defraud, it does not vitiate. *Beasy* vs. *Haines*, 4 Whart. 17. *Foust* vs. *Renno*, 8 State R. 378. *Thorton* vs. *Appleton*, 29 Maine R. 298. *Ford* vs. *Ford*, 17 Pick. 418. *Smith* vs. *Dunham*, 8 id. 249. *Adams* vs. *Frye*, 3 Met. 103. And such is the very point, and the only relevant one, decided in our case of *Marshall* vs. *Goughler*, 10 S. & R. 164. Without attempting to reconcile the learned judge's reasoning in this case with his conclusion, we may account for it by observing that he had not got his mind free from the ancient rule which regarded the matter as a question of pleading, and not one as to the relations of the parties.

On the same day with this last case, the same learned judge gave the opinion in *Stahl* vs. *Berger*, ibid. 170, wherein the filling up of a blank according to the original intention of the obligor was held not to vitiate; and he declares as to alterations that "the true ground seems to be that it should be in fraud of the party interested." Nor can any one read his opinions in *Babb* vs. *Clemson*, ibid. 424, and *Heffelfinger* vs. *Shutz*, 16 S. & R. 44, without observing that the same principle is assumed. *Hudson* vs. *Reel*, 5 State R. 279, was a case of apparent mutilation, and it was left to the jury to say "whether there had been any tampering with or alteration of the writing with a view to deprive the defendant of any legal advantage"—and this was held, in this court to be correct. In *Arrison* vs. *Harmstead*, 2 State R. 194, Mr. Justice Rogers assumes that it must be a "fraudulent alteration" as well as subsequent, in order to vitiate.

But by admitting oral testimony to sustain even an honest correction made by one party, do we not leave a door open for fraudulent alterations? Let it be admitted that we do. There is still very great value in written contracts, for they do most efficiently reduce the chances of disputes; because an agreement to be written

must be first well defined, and when it is written, the writing corrects the inaccuracies of the memory. But it cannot exclude oral testimony, for this must be admitted, at least to show performance, satisfaction or payment, in discharge of the contract; and here fraud may be practised. The law does not expect ever to exclude frauds entirely. Before it can succeed in doing so, it must repress all business and all freedom of action. We cannot by legislation make people either accurate or honest. Even a written contract may be tainted with fraud and that must be exposed. It may contain an error or omission, and that must be proved. If we refuse either, we encourage fraud. If we allow either, we open a door by which fraud may enter in the very face of the Court and by its aid. What shall we do? The law in its wise experience declares, that by refusing to hear evidene of fraud and mistake against a written contract, there is more encouragement given to fraud than by receiving it; for dishonest men alone commit frauds and refuse the correction of mistakes; and frauds are much more apt to be committed against confiding honesty, in a private transaction, than against the awakened suspicion of a judicial tribunal.

Here a mistake is alleged and corrected by the plaintiff, and the true question is, has the mistake been proved and the correction rightly made? and the jury have answered that it has. The plaintiff gained nothing by making the correction himself, and did not seek to. It was indiscreet in him to make the correction, but he did no wrong by it, and should not suffer for it.

For these reasons we think that this judgment should be affirmed.

Judgment reversed.

In the Court of Common Pleas of Perry County, Pennsylvania.

CASSEL *vs.* HERRON & PATTERSON.

1. The concealment of a known defect in a horse, not within the reach of observation by the vendee, and not made known to him at the sale, such as glanders, which, by reason of powders administered by the vendor, had assumed a latent form, will avoid the contract.